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Supreme Court of the United States

October Term, 1930.

No. 24.

NOAH CROOKS, COLLECTOR OF INTERNAL REVENUE,
Petitioner,

vs.

BENJAMIN HARRELSON ET AL.,
Respondents.

RESPONDENTS' BRIEF

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RESPONDENTS' BRIEF

STATEMENT.

The petitioner, in its brief, has correctly stated the facts, and the question presented for determination.

In this brief the respondents answer, in the order in which they appear in petitioner's brief, each of the contentions which is urged by petitioner in support of its specification of error.

THE STATUTE INVOLVED.

Sec. 402, Revenue Act of 1918: That the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated.

(a) To the extent of the interest therein of the decedent at the time of his death which after his death is

subject to the payment of the charges against his estate and the expenses of its administration and is subject to distribution as part of his estate.

The remaining provisions of Section 402 of the Revenue Act of 1918 are found on pages 29 and 30 of the petitioner's brief.

SUMMARY OF ARGUMENT.

I.

Real estate owned by the decedent at the time of his death is not taxable under Section 402 (a) of the Revenue Act of 1918 unless it fulfills all of the conditions expressed therein.

II.

The petitioner's contentions are incorrect because—

(a) Paragraph (a) of Section 402 of the Revenue Act of 1918 is not ambiguous and there is no room for the construction of said provision.

(b) The language of said paragraph is not inartificial or loosely used, and it means exactly what is stated therein.

(c) Congress intended that the Commissioner of Internal Revenue should determine by state laws what interests were taxable under said paragraph.

(d) The provision as enacted does not violate the constitutional requirement of uniformity as contended by petitioner.

(e) The provision is not discriminatory or incongruous as contended by petitioner.

(f) The decision of the Circuit Court of Appeals in this case is in harmony with the regulations of the Treasury Department.

(g) The decision of the Court of Claims in the case of *Steedman vs. United States* misconstrued the provision and is in error.

III.

(a) The provision requires that property, to be taxable thereunder, must be subject to the charges against the estate and the expenses of its administration.

(b) The word "and" in the provision does not mean "or" as contended by the petitioner.

IV.

(a) The common law rule that real estate is not subject to the payment of the expenses of the administration of decedent's estates has not been modified by the statutes of Missouri and is in full force in said State.

(b) The commission allowed upon the sale of real estate to pay debts of a decedent is not an expense of administration.

(c) The petitioner in its brief has misconstrued certain decisions of the Missouri courts.

CONCLUSION.

Certain real estate in Missouri, being property of the decedent in this case, and not otherwise taxable under the statute, is not taxable under said paragraph (a) of said Section 402, and it was so held by the Circuit Court of Appeals. The decision of said court should be affirmed.

ARGUMENT.

I.

Real Estate Owned by the Decedent at the Time of His Death Is Not Taxable Under Section 402 (a) of the Revenue Act of 1918 Unless It Fulfills All of the Conditions Expressed Therein.

We rely upon:

United States vs. Field, 255 U. S., 257;
Lederer vs. Northern Trust Company, 262 Fed.

52, affirming same case 257 Fed. 812;
Randolph vs. Craig, 267 Fed. 993.

In the *Field* case, this Court dealt with the question whether, under the same provision of the Revenue Act of 1916, property which passed under a testamentary execution of a general power of appointment was subject to the Federal Estate Tax. This Court reached the conclusion that the provisions of the law imposing the tax could not be extended by implication and held that the conditions found in Section 202 (a) of the Revenue Act of 1916 (which conditions are precisely the same as the conditions found in Section 402 (a) of the Revenue Act of 1918) "are expressed conjunctively; and it would be inadmissible, in construing a taxing act to read as if prescribed disjunctively."

After the *Field* case was decided, the Treasury Department adopted Article 11 of Regulations 63, promulgated and approved by the Secretary of the Treasury on July 27, 1922, dealing with the section of the Revenue Act in question and in part providing:

> "The test which determines whether the value of a given interest is to be so included, pursuant to the foregoing provision of the statute, is that stated therein which requires that the property, after death, shall be subject to (1) payment of the charges against the estate, (2) payment of the expenses of administration, and (3) distribution as part of the estate."

Article 10 of Regulations 68 promulgated under the Revenue Act of 1924 was identical with Article 11 of Regulations 63.

Section 302 (a) of the Revenue Act of 1926 differed from Section 402 (a) of the Act of 1918 in that it removed the conditions ruled on by this Court in the *Field* case. The Act, so changed, subjected to the Federal Estate Tax all real and personal property "to the extent

of the interest therein of the decedent at the time of his death", with no limitations or conditions.

Article 10 of Regulations 68 remained in force until the promulgation of Article 10 of Regulations 70 under the Revenue Act of 1926, promulgated March 23, 1929, wherein the change in the law effected by Section 302 (a) of the Revenue Act of 1926 is recognized. Article 10 of Regulations 70 reads in part as follows:

> "Where the decedent died prior to 10:25 A. M., Washington, D. C., time, February 26, 1926, the test which determines that the value of a given interest is to be included in the gross estate under the provisions of Subdivisions (a) of the corresponding sections of the Revenue Acts prior to that of 1926, is whether the property, after death, shall be subject to: (1) Payment of the charges against the estate; (2) payment of the expenses of administration; and (3) distribution as a part of the estate. *This test is not applicable if the decedent died subsequent to the effective date of the Revenue Act of* 1926." (Italics ours.)

Section 402 of the Revenue Act of 1918 constitutes a single sentence. The opening words of the Section are to be read in connection with the several Subsections, and these Subsections (a) to (f), "are what their language states them to be: *extent clauses and not exception clauses.*" (Italics ours) United States Court of Appeals in *Crooks vs. Harrelson,* 35 Fed. (2d) l. c. 417.

II.

(a) Paragraph (a) of Section 402 of the Revenue Act of 1918 Is Not Ambiguous and There Is No Room for the Construction of Said Provision.

Under Point I of the petitioner's brief it is contended that this Court should ignore the plain meaning of the language used in paragraph (a) Section 402 of the Rev-

enue Act of 1918 and construe it "to provide for the inclusion of the value of all real estate in which the decedent had an estate of inheritance in his own right at the time of his death."

The construction contended for would require this Court to eliminate the three conditions set forth in said paragraph (a) as follows:

(1) to the extent of the interest therein of the decedent at the time of his death, which after his death is subject to the payment of the charges against his estate, and

(2) the expenses of its administration, and

(3) is subject to distribution as part of his estate.

Congress in the Revenue Act of 1926 amended the law so as to eliminate the said conditions, the corresponding Section of the Act of 1926 (Section 302 (a) being as follows:

"(a) To the extent of the interest therein of the decedent at the time of his death."

However, if Congress had had the same intention in passing the Revenue Act of 1918 as it had in enacting the Act of 1926, it is manifest that it would have been just as easy to have expressed said intention in 1918 as it was in 1926, and if at any time it had an intention to enact such a provision as is contended for by the petitioner it would have done so by the use of appropriate language.

Shwab vs. Doyle, 258 U. S., 529.

It is fundamental that in the absence of ambiguity in a statute there is no room for construction. The language of Section 402 (a) of the Revenue Act of 1918 is plain and unambiguous and this Court may not read into it an intention not expressed. The statute involved is a

taxing statute and it is also fundamental that if the meaning of a taxing statute is ambiguous, it should be construed in favor of the taxpayer; but in this case the petitioner asks the Court to adopt a construction against the taxpayer not warranted by the language used.

In the case of *United States vs. Merriam,* 263 U. S., 179, 187–8, this Court held that

> "On behalf of the Government is is urged that taxation is a practical matter and concerns itself with the substance of the thing upon which the tax is imposed rather than with legal forms or expressions. But in statutes levying taxes the literal meaning of the words employed is most important for such statutes are not to be extended by implication beyond the clear import of the language used. If the words are doubtful, the doubt must be resolved against the Government and in favor of the taxpayer."

citing *Gould vs. Gould,* 245 U. S., 151, 153; *Partington vs. Attorney General,* L. R. 4 H. L. 100, 122; and *Eidman vs. Martinez,* 184 U. S. 578, 583.

In *Ebert vs. Poston,* 266 U. S. 548, 553, 554, this Court said—

> "There is a further contention that the broad purpose of the Act declared in Section 100, demands that it be liberally construed to include the situation presented by this case. Persuasive legislative reasons for distinguishing between the cases explicitly cared for by Sections 302, 205, and the present case suggest themselves. We have no occasion to state them. The judicial function to be exercised in construing a statute is limited to ascertaining the intention of the legislature therein expressed. *A casus omissus does not justify judicial legislation.* * * * Such care and particularity in treatment preclude expansion of the Act in order to include transactions supposed to be within its spirit, but which do not fall within any of its provisions." (Italics ours.)

citing *United States vs. Weitzel,* 246 U. S. 533.

The history of Section 402 of the Revenue Act affords ample illustration of the proposition that the remedy for omissions is not to be found in strained judicial construction but in the enactment of new subsections to cover such omissions. In *Empire Fuel Company vs. Hays,* 295 Fed. 704, the Court stated:

> "It is the duty of courts to interpret and enforce the statutes, not to inquire into their underlying policy, their reasons, or their effect when enforced. If a statute is unsound in its operation, the remedy is with the Legislature, and not with the judiciary. Courts have no power to suspend the operation of a statute, even though that operation might furnish an advantage to one citizen as against another, provided the statute is constitutional."

We submit that Section 402 of the Revenue Act of 1918 is drawn with such particularity as to leave no room for conjecture. It describes in detail the several items of property which are taxable thereunder. Rarely does it provide for the taxing of all property of any of the several items. Thus, in paragraph (a) the entire value of the property is not taxed but only the interest therein of the decedent at the time of his death and that interest is not taxable unless it is subject to the payment of the charges against his estate and the expenses of its administration and is subject to distribution as part of his estate. Paragraph (b) covers dower interests. In paragraph (c) every interest of which the decedent has made a transfer is not taxed because there are excepted those transfers where a bona fide sale for a fair consideration or money's worth was made, and no interest transferred is taxable unless the transfer was made in contemplation or intended to take effect in possession or enjoyment at or after death. In paragraph (d) every joint estate is

not taxed because there is excepted such part thereof as did not originally belong to decedent. Under paragraph (e) every property passing under a general power of appointment is not taxed because there are excepted those cases where the transfer was made by deed not executed in contemplation of or intended to take effect in possession or enjoyment at or after death and also those cases of bona fide sale for a fair consideration in money or money's worth. Under paragraph (f) all insurance payments under policies upon the life of the decedent are not taxable because no tax is levied upon policies taken out by other persons upon the life of the decedent, and payments made under policies taken out by the decedent on his life, but payable to other persons than the executors, are not taxable unless they exceed $40,000.00 and only to the amount that they exceed said sum.

It is true as stated on page 10 of the petitioner's brief that at common law real property of the decedent was not liable for the payment of either simple contract debts or the expenses of administration. In those states in which real estate is now subject to such debts and such expenses, it is by virtue of a state statute modifying the Common Law. As an appendix to petitioner's brief is a summary of the statutes of the several states changing the common law in that respect. Said compilation shows that in ten states the common law has been changed to the extent of rendering the real estate liable for the payment of debts of the decedent, but not for the payment of expenses of administration. Said summary also shows that in twenty-two states the common law has been changed so as to provide for the sale of real estate to meet the payment of administration expenses only after the personal property has been exhausted and that there are only sixteen states where the statutes provide for

the sale of real estate to pay administration expenses unconditionally.

Congress is presumed to know the law and to know that there was a considerable difference in the laws of the several states with reference to the liability of the real estate of a decedent to pay the expenses of administration. In view of the lack of uniformity of the laws of the several states, the provision in Section 402 (a) levying a tax upon only such real estate of decedents as is subject to the payment of charges against the estate and the expenses of its administration is all the more significant.

(b) The Language of Section 402 (a) Is Not "Inartificial or Loosely Used" as Contended by the Petitioner, but Means Exactly What Is Stated Therein.

The only reason urged by the petitioner in support of the contention that said paragraph is not to be construed according to the plain meaning of the language used is that the said language of said paragraph (a) "is inartificial and is loosely used." (Page 10.) There is only one word in said paragraph (a) which is pointed out in petitioner's brief as being inaccurate or ambiguous and that is the word "distribution" with which this case is not concerned. The point is made that the only property which is subject to distribution as a part of an estate in the "accurate" meaning of that word is personal property, whereas the paragraph is intended to include real as well as personal property. (Page 11.) (Attention is invited to the discussion of this point in the opinion of the court below (R. 11-12) which is directly contrary to the statement made in the footnote on page 10 of the petitioner's brief.)

We deny that the word "distribution" as used in said Section 402 (a) is inaccurate or ambiguous. While the word "distribution" has a *technical* meaning in accordance

with the petitioner's contention, it is fundamental that the words of the statute are to be construed in their natural, plain and ordinary signification as was held by the court below in the instant case.

36 Cyc. 1114 and cases cited.

The general meaning of the word "distribution" is "the act of distributing or dispensing; the act of dividing or portioning among several or many; the act of dividing or making apportionment; apportionment."

18 C. J. 1291 and cases cited.

Except for the alleged misuse of the word "distribution", it is not apparent from the petitioner's brief why this court should give a different meaning to the language of said paragraph (a) than that which the plain language imports, except the fact that the construction urged by the petitioner would enable the Internal Revenue Bureau to tax some property which is not within the purview of the language of the provision as enacted.

On page 9 of the petitioner's brief it is admitted that the five paragraphs immediately following said paragraph (a) "are most comprehensive and evidence sedulous care to include in the gross estate all property which could be regarded as having undergone a taxable transfer by death." There is no reason for believing that any less care was exercised in one paragraph than in any other, and that it was within the power of Congress to define what was a "taxable transfer," and that only those are taxable transfers which are specifically enumerated as such in the statute. Congress used the identical language in the Revenue Acts of 1916, 1918, 1921, and 1924.

Moreover, the language of said paragraph (a) has already been construed not only by the court below, but by this court in the case of *United States vs. Field*, 255

U. S. 264, to mean precisely what is stated therein. That case arose under Section 202 (a) of the Revenue Act of 1916, but the language of that Section is identical with said paragraph (a) of Section 402 of the Revenue Act of 1918. In the *Field* case this Court held that the said language in the Revenue Act of 1916 meant exactly what it states and that, unless an interest of the decedent fulfilled all of the conditions enumerated therein, it was not taxable under said provision. The subject matter of the controversy in the *Field* case was certain property passing under a general power of appointment. It was held that that property was not taxable because it did not fulfill two of the conditions, namely, it was not the property of the decedent at the time of her death nor subject to distribution as a part of her estate. In the opinion of the Court in the *Field* case it is stated that:

> "It would have been easy for Congress to express a purpose to tax property passing under a general power of appointment exercised by decedent had such a purpose existed; and none was expressed in the act under consideration. In that of February 24, 1919, which took its place the section providing how the value of the gross estate of the decedent shall be determined contains a clause precisely to the point (Section 402 (e), 40 Stat. 1097 * * * Its insertion indicates that Congress at least was doubtful whether the previous act included property passing by appointment."

We submit that the petitioner would have this Court construe and apply Section 402 (a) of the Act of 1918 as if it read identical with Section 302 (a) of the Act of 1926; that is, by striking out the three conjunctive conditions. It would have been easy for Congress to have omitted said three conditions from the Act of 1918 if such had been the will of Congress.

On page 19 of the petitioner's brief it is stated that the *Field* case involved no question of state law or the meaning of the phrase "subject to the payment of the charges against his estate and the expenses of its administration," but we say that the Court in that case specifically refers to the law of Illinois and decided the case with reference to the conditions in said paragraph (a) as applied to the law of Illinois. After discussing the general rule of the liability of appointed property to the payment of the decedent's debts at common law the Court stated, "It is tacitly admitted that the rule obtains in Illinois, and we shall so assume."

In the case of *United States vs. Bashaw,* 50 Fed. 1. c. 754, cited by this Court in the *Field* case, the Court held—

> "It is a fundamental rule of construction that, if possible, force must be given to all the words used therein, and also that, when a previous statute is amended by an alteration of the terms used therein it is to be presumed that it was the intent to alter the meaning of the previous Act in that particular. * * * The natural presumption is that the phraseology of the statute was changed in order to change its meaning. The very fact that the prior Act is amended demonstrates the intent to change the pre-existing law, and the presumption must be that it was intended to change the statute in all the particulars touching which we find a material change in the language of the Act."
>
> See also *Shwab vs Doyle,* 258 U. S., 529.

(c) Congress Intended That the Commissioner of Internal Revenue Should Determine by State Laws, What Interests Were Taxable Under Section 402 (a).

On page 12 of the petitioner's brief the point is made that Congress did not intend that the Commissioner of Internal Revenue, in computing the value of the gross estate, should be required to consult the statutes and the

decisions of the state in which the real estate is located in order to determine whether or not the value of the real estate should be included in computing the estate tax. No decision of any Court is cited in support of this contention and it is contrary to every decision which we have been able to find. We see no reason why the Commissioner should not be required to consult the said statutes and decisions. On the contrary, it is necessary for the Commissioner to do so in order to apply the law. The question whether a particular interest in land is taxable under said paragraph (a) of Section 402, depends entirely upon the law of the state where the land is situated.

This Court, in *United States vs. Field, supra,* considered the law of the state of Illinois (the state where the property in question was situated) in determining that such property failed to meet the conditions in the Federal Act and was therefore not taxable. Also, the Circuit Court of Appeals, 3rd Circuit, in *Lederer vs. Pearce,* 266 Fed. 497, has said.

> "From the form of the Federal Estate Tax Act, it is evident that Congress intended that the Act should operate not in opposition to, but in harmony with the many different State Acts, with which, because of its very terms, it would come into contact * * * Thus it appears that the Federal Estate Tax may reach property in one state when it would fail to reach like property in another, according as the laws of distribution and administration vary in different states. The law of the state being the test of the valid assessment of the tax against given property. * * *."

And again the Circuit Court of Appeals, 9th Circuit, in *Wardell vs. Blum,* 276 Fed., 226, stated with reference to Section 402 (a) that:

"The statute of the United States imposes an inheritance tax upon the transfer of the net estate of every decedent 'to the extent of the interest therein of the decedent at the time of his death which after his death is subject to the payment of the charges against his estate and the expenses of its administration, and is subject to distribution as part of his estate.' How is that interest to be determined? Manifestly, we think, by the law of the state where the property is situate."

Brine vs. Hartford Insurance Company, 96 U. S. 627;
Clarke vs. Clarke, 178 U. S. 186;
De Vaughn vs. Hutchinson, 165 U. S. 566;
Hibbard vs. Crooks, (D. C. Mo.) 25 Fed. (2d) 896.

And please compare *New York Trust Company vs. Eisner,* 256 U. S. 345 with *Keith vs. Johnson,* 271 U. S. 1.

By common law, real estate descended by intestacy or devised by will was not liable to simple contract debts of the ancestor or testator; nor was the heir bound even by a specialty, unless he was specially named. 4 *Kent. Comm.* 419-420, citing 3 *Black, Com.* 430, *Co.* Litt. 209, a, So that it is necessary for the Commissioner to refer to the state statutes to determine whether or not the interests of a decedent in lands fulfills the condition of Section 402 (a) of being subject to the payment of the charges against his estate, as well as the condition of being subject to the payment of the expenses of its administration. Moreover, by the common law title by escheat and by forfeiture obtained (e. g., in the cases of foreigners, for lack of heirs, for the commission of certain crimes, for the commission of waste, etc.). And the Commissioner may have to refer to state statutes and decisions in many cases to determine whether or not the interest of a decedent in real estate fulfills the condition of Section 402

(a) of being subject to distribution as a part of his estate, because it is only by statutes of the several states that the rigors of the common law have been modified or abolished.

Under each and every Revenue Act from 1916 to 1928, both inclusive, the amount of Federal Estate Taxes payable by any estate depends to some extent upon the laws of the state in which the estate is being administered. For example: Section 203 (a) (1) of the Act of 1916, provided that for the purpose of the Federal Estate Tax, there should be deducted from the value of the gross estate—"Such amounts for * * * support during the settlement of the estate of those dependent upon the decedent, and *such other charges* against the estate, *as are allowed by the laws of the jurisdiction,* whether within or without the United States, under which the estate is being administered." (Italics ours.)

Article 38 of Regulations 37 provides in part that "In order to be deductible, the item must be of the character described in the statute; and it must also be one the payment of which out of the estate is *allowed by the law of the jurisdiction administering it.* Where the item is not one of those described, it is not deductible merely because payment is allowed by the *local law.* On the other hand, no item is deductible unless its payment is so allowed. * * * Where the amount which may be expended for the particular purpose is limited by the *local law,* no deduction in excess of such limitation is permissible. Where the *local courts* have approved the expenditure it will ordinarily be allowed for deduction." (Italics ours.)

From the foregoing and from an examination of the subsequent Revenue Acts and the Regulations promulgated thereunder, it is obvious that the Federal Estate Tax has

at all times been, and is now, so interwoven with the laws of administration of the several states as to be practically inseparable therefrom and that Congress clearly intended that such a situation should exist. It thus appears that Congress not only did intend that the taxability of property of a decedent should, in certain respects, depend upon the laws of the several states, but it becomes obvious that, in the type of legislation under consideration, Congress had to consider and take into account the statutes and decisions of the several states.

Certainly when Congress, in 1916, and in the subsequent Revenue Acts of 1918, 1921, and 1924, provided that there shall be subject to the Federal Estate Tax property which is subject to the conditions indicated, it never had in mind any Federal law because there was no Federal law by which to measure such conditions. Only by the laws of the several states could it be determined whether the property of the decedent meets the three conditions.

Moreover, it should be remembered that real estate *as such* is not taxed by Section 402 (a), but only "to the extent of the interest therein of the decedent" which "is subject to" the three conditions set forth in Section 402(a).

(d) The Provision as Enacted Does Not Violate the Constitutional Requirement of Uniformity as Contended by Appellant.

The petitioner, on page 13 of its brief, questions the constitutionality of an Act which results in the imposition of taxes upon real estate in some states and fails to tax the same class of property located in other states. If that is material, we would say that it is purely academic so far as the consideration of Section 402 (a) of the Revenue Act of 1918 is concerned, because said provision taxes the same class of property wherever it may be in the

United States, and reaches all real estate wheresoever situated and to whomsoever belonging which fulfills the conditions prescribed in said paragraph (a).

The only rule of uniformity prescribed by the Federal Constitution with respect to duties, imposts, and excises laid by Congress is the territorial uniformity which the United States Constitution, Article 1, Section 8, requires.

LaBelle Iron Works vs. United States, 256 U. S. 377;

Brushaber vs. Union P. R. Co., 240 U. S. 1

A tax is uniform within the meaning of the constitutional provision on that subject, when it operates with the same effect in all places where the subject is found; and it is not wanting in such uniformity because the thing taxed is not equally distributed in all parts of the United States.

Edye vs. Robertson, 112 U. S. 580.

The uniformity required is not an intrinsic uniformity relating to the inherent character of the tax as respects its operation on individuals; but is merely a geographical uniformity requiring the same plan and the same method to be operative throughout the United States.

Knowlton vs. Moore, 178 U. S. 41.

In the case of *Billings vs. United States,* 232 U. S. 261, it was held that a tax upon the gross tonnage of foreign-built pleasure yachts owned by citizens of the United States did not violate the uniformity clause because a like tax was not imposed upon the use of a domestic yacht under similar circumstances.

In the case of *Flint vs. Stone Tracy Co.,* 220 U. S. 107, it was held that inequality of application owing to different local conditions did not invalidate the excise imposed by the Act of August 5, 1909, upon the doing or the carrying on of business in a corporate or quasi corpo-

rate capacity; and that the exemption of a similar business when carried on by a partnership or private individual did not invalidate the Act inasmuch as the only limitation upon the power of Congress is a geographical uniformity.

It is submitted that the contention of appellant is completely answered by the decision of this Court in *Florida vs. Mellon,* 273 U. S. 12. In that case, 1. c. 16, we find—

> "It is further alleged * * * that the several states except Florida, Alabama and Nevada, levy inheritance taxes, but by reason of the provisions of its constitution, Florida cannot place its citizens on an equality with those of the other states in respect to the tax in question, and therefore the tax is not uniform throughout the United States, as required by Sec. 8 of Art. I of the federal constitution."

The Court finds, l. c. 17, that—

> "The contention that the federal tax is not uniform because other states impose inheritance taxes while Florida does not, is without merit. Congress cannot accommodate its legislation to the *conflicting or dissimilar laws of the several states* nor control the diverse conditions to be found in the various states *which necessarily work unlike results from the enforcement of the same tax.* (Italics ours..) All that the Constitution (Art. I, Sec. 8 cl. I) requires is that the law shall be uniform in the sense that by its provisions the rule of liability shall be alike in all parts of the United States."

(e) The Provision Is Not Discriminatory or Incongruous as Contended by Petitioner.

The provision requiring that property shall be subject to the payment of administration expenses in paragraph (a) of Section 402 of the Revenue Act of 1918, literally construed in accordance with its plain and precise language is neither discriminatory nor manifestly incongru-

ous as stated on page 13 of the petitioner's brief. The Supreme Court of the United States in the case of *United States v. Field* had no difficulty in construing this statute and did not find it incongruous or discriminatory. The Internal Revenue Bureau in its regulations did not find it discriminatory or incongruous and the United States Circuit Court for the 3rd circuit in *Lederer vs. Pearce,* 266 Fed. 497, and the United States District Court in *Randolph vs. Craig,* 267 Fed. 933, also found that the language of the statute meant exactly what the plain purport of the words implied.

It is interesting to note that the decision in the cases above cited are exactly in line with the precise language of the regulations always in force in respect to this provision of the statute.

Elsewhere in the brief it is pointed out and here we reiterate that the contention of the Government would result not in a construction of the language of the provision but in the substitution of an amendment to the 1916, 1918, 1921, and 1924 acts, whereas Congress did not amend this provision until the 1926 Act.

(f) The Decision of the Circuit Court of Appeals in This Case Is in Harmony With the Regulations of the Treasury Department.

On pages 16 and 17 of the petitioner's brief, it is urged that the construction contended for by the petitioner is in accordance with contemporaneous and continued construction of the provision by the Department charged with its administration and, therefore, is entitled to great weight. We take issue with the petitioner as to the statement of fact.

The identical language of this provision was enacted in Section 302 of the Revenue Act of 1916. Article 4 of Regulations 37, promulgated October 10, 1916, construing

said Section, printed on page 31 of the petitioner's brief, is plain and unambiguous and utterly fails to sustain the contention of the petitioner. The meaning given paragraph (a) follows the language of said provision and is precisely what we contend for, as follows:

> "(1) The entire estate of every kind, real, personal, mixed, tangible and intangible property, coming into the hands of executors or administrators, or such as would legally come into their charge if executors or administrators were appointed, *and which property would be subject to charges against the estate, expenses of administration, and distribution to the heirs or legatees.*" (Italics ours.)

The petitioner on page 16 of the brief states that these Regulations "were not very definite." They seem to us to be very definite, direct and unambiguous.

Following the enactment of the Revenue Act of 1918, said Regulations 37 were revised in 1919, and were again revised in January, 1921. In each of said revisions, the various paragraphs of Section 402 were printed, but without any comment thereon other than as set forth on pages 32-35 of the petitioner's brief. We submit that the said Regulations do not assume to construe the language of any of the paragraphs of Section 402, in any particular. However, the identical language of paragraph (a) of Section 402 was re-enacted as Section 402 (a) of the Revenue Act of 1921, and Article 11 of Regulations 63, relating to estate taxes under the Revenue Act of 1921, promulgated by the Commissioner of Internal Revenue and approved by the Secretary of the Treasury on July 27, 1922, printed on page 34 of the petitioner's brief, provides as follows:

> Article 11. Character of Interests Included.—It is designed by the foregoing provision of the statute that there shall be included in the gross estate the value of all property of the decedent whether real or

personal, tangible or intangible, the beneficial ownership of which was in the decedent in his lifetime, and which, upon his death, formed his estate * * *.

"The test which determines whether the value of a given interest is to be so included, pursuant to the foregoing provision of the statute, is that stated therein which requires that the property, after death, shall be subject to : (1) payment of the charges against the estate, (2) payment of the expenses of administration, and (3) distribution as a part of the estate."

The above language of the Regulation of the Treasury Department is, we submit, clear and unmistakable in its meaning, follows the language of the statute, and is in harmony with the meaning for which we contend, and contrary to the construction now being urged by the petitioner.

The identical language of said paragraph (a) was reenacted as Section 302 (a) of the Revenue Act of 1924, and Article 10 of Regulations 68 promulgated March 26, 1925, is (as indicated on page 35 of the petitioner's brief) identical with the language quoted above from Article 11 of Regulations 63.

As stated on page 6 of this brief, said paragraph (a) was amended in the Revenue Act of 1926 so as to include in the gross estate of the decedent the value of all property "To the extent of the interest therein of the decedent at the time of his death" and the three conditions imposed by paragraph (a) of the former Revenue Acts were omitted. Thereafter, the Treasury Department promulgated Regulations 70 on August 24, 1926, and Article 10 thereof, quoted on page 35-36 of the petitioner's brief, provided as follows—

"ART. 10. CHARACTER OF INTERESTS INCLUDED.—It is designed by the foregoing provision of the statute that there shall be included in the gross estate

the value of all property of the decedent, whether real or personal, tangible or intangible, the beneficial ownership of which was in the decedent at the time of his death.

"Where the decedent died prior to 10:25 A. M., Washington, D. C., time, February 26, 1926, the *test which determines* that the value of a given interest is to be included in the gross estate under the provisions of subdivisions (a) of the corresponding sections of the Revenue Acts prior to that of 1926, is whether the property, after death, shall be subject to: (1) Payment of the charges against the estate; (2) payment of the expenses of administration; and (3) distribution as a part of the estate. *This test is not applicable if the decedent died subsequent to the effective date of the Revenue Act of* 1926." (Italics ours.)

It is thus apparent that the Treasury Department recognized that the Act of 1926 effected a complete change in the law, and even after the date of the passage of the 1926 Act the Treasury Department continued to recognize that under the prior acts no property not meeting the three conditions of paragraph (a) was taxable.

Statements on pages 16 and 18 of the petitioner's brief to the effect that the practice of the Treasury Department was contrary to the wording of its own regulations is an erroneous statement of fact. But there is no evidence in the record from which this Court could determine what is the fact.

We submit that the Treasury Department has not, in any of its Regulations, found any ambiguity in the language of paragraph (a) of said Section 402, has not construed said language as meaning other than the plain import of the words used therein and has not construed said provision as urged by the petitioner, but has always

construed the statute precisely as respondents are now contending the same should be construed.

(g) The Decision of the Court of Claims in Steedman vs. United States Misconstrued the Statute.

Petitioner relies upon *Steedman vs. United States,* 63 Ct. Cls. 226 and *Bartlett vs. Commissioner,* 16 B T. A. 811. In the *Bartlett* case, there was a dissenting opinion which we contend sets out the law of the case. The decision of the Court of Claims in the *Steedman* case was considered both by the District Court and the Circuit Court of Appeals in the instant case. The District Court said:

> "Defendant cites the case of *Steedman vs. United States,* a decision by the Court of Claims involving the same question as that involved here. I have read the opinion in that case carefully. I think it is not well reasoned and that its conclusion is erroneous." (R. p. 9.)

The Circuit Court of Appeals said:

> "The case of *Steedman vs. United States,* 63 Ct. Cls. 226, involved a question identical with that in the case at bar, and a conclusion was reached by that court opposite to the one which we have above indicated. We have the utmost respect and deference for the opinions of that court. We have therefore given careful thought and consideration to the opinion in the *Steedman* case and we regret that we are unable to acquiesce in the conclusion therein reached." (R. p. 15.)

An examination of the opinion of the Court of Claims in the *Steedman* case will show that the Court misconstrued Section 402 of the Revenue Act of 1918, and erroneously held that it was not necessary to construe the precise language of any part of the statute, but that any

particular provision should be construed in accordance with the general purpose of the Act. On the other hand, the Circuit Court of Appeals in the case at bar said—

> "The entire section constitutes a single sentence. * * * It is only by reading the opening words in connection with one or more of the clauses (a) to (f) that any definite amounts of any kind of property can be arrived at. Clauses (a) to (f) are what their language states them to be—extent clauses and not exception clauses." (R. p. 11.)

Where statutes are ambiguous, Courts sometimes do extend the meaning of a particular provision of a statute, especially in remedial legislation. But this particular statute is not ambiguous and there is no room for construction. And that even if there were, the rule is entirely different in the case of a taxing statute. This Court has held in the case of *United States vs. Merriam,* 263 U. S. 187, that:

> "in statutes levying taxes, the literal meaning of the words employed is most important for such statutes are not to be extended by implication beyond the clear import of the language used."

Moreover, in the case of *Nyberg, Administrator, vs. United States,* 66 Ct. Cls. 153, that Court, in construing said Section 402 (a), apparently receded from the reasons upon which it based its conclusion in the *Steedman* case. The following language in the latter decision is significant:

> "402 (a) above quoted, mentions three conditions for determining the character of the property, the value of which should be included in the gross estate, (1) that it be subject to the payment of the debts of the decedent; (2) that it be subject to the payment of administration expenses; (3) that it be subject to distribution. The property under discussion was subject to each of these conditions."

III.

(a) The Statute Requires, Inter Alia, That Property, to Be Taxable Thereunder, Must Be Subject to the Charges Against the Estate and the Expenses of its Administration.

Under Point II of the petitioner's brief it is urged that Section 402 (a) should be construed to mean that if, under the law of a state, the real property of a decedent could, as a practical matter, be applied either directly or indirectly to the payment of expenses of administration, under any circumstances, then the real estate of decedents in such state fulfills the condition of Section 402 (a). The question is academic in the case at bar, because as we show on pages 33 to 43 of this brief, the real estate of decedents in Missouri cannot be applied either directly or indirectly, under any circumstances to the payment of the administration expenses. Congress could have enacted such a provision, but it did not do so. The statute provides for a uniform tax throughout all the states upon certain interests in property of decedents, and it enacts that the interest of any decedent in any property is taxable provided it fulfills certain conditions, among them being that said property is subject to the charges against the estate and the expenses of administration. The ordinary meaning of the word "subject" is not the same as "could as a practical matter be applied either directly or indirectly under any circumstances," and there are no decisions of courts so construing the word "subject". The petitioner cites no authorities in support of its contention.

The Supreme Court of the United States in *Webb vs. Sharp,* 13 Wall., l. c. 17, in construing the words in a statute "subject to execution for debt" held them to mean "subject to sale by execution." In *Mississippi Mills vs. Cook,* 56 Miss. l. c. 52, the phrase "subject to" is held

to mean "liable." Likewise see *Auburn and Syracuse R. Co. vs. Hoadley,* 195 N. Y. S. 517; *Cook vs. Senior,* 3 Kans. App. 278; *Stebbins vs. Hall,* 29 Barb. (N. Y.) 524. The phrase "subject to the payment of an expense" has a definite meaning as demonstrated by the cases, i. e., "charged with the payment," "liable for the payment," "subject to sale for the payment."

The Missouri Appellate Courts in several cases deal with the expression "subject to" or "subject" in discussing the matter of subjecting the land to the burdens of expenses of administration or other burdens. Thus in *Grant vs. Hathaway,* 215 Mo. 147, the Supreme Court of Missouri in referring to the statutory provision vesting the land in the heirs states that it so vests the land "subject to statutory rights."

Again in In re *Motier's Estate,* 7 Mo. App. 514, the Court held:

> "The land * * * *cannot be touched for any of the purposes of the administration except in the specific mode and for the specific objects* elsewhere indicated by statute. When real estate is converted into money, whatever surplus remains after a proper application of the objects of the conversion, still represents the realty for the benefit of the heirs and cannot be merged in the personalty for purposes which pertain only to that classification." (Italics ours.)

Again in *Garnett vs. Carson,* 11 Mo. App. 290, the Court held:

> "It is quite settled that no order of sale of real estate can be made for the costs of administration. (Citing cases) * * * And again, these allowances to persons employed by the administrator for services rendered to the estate at the administrator's request, as to the reasonableness of which the Probate Court would never have been consulted, being costs of administration, as they clearly are, *would sub-*

ject the real estate to sale as debts of the deceased, which they are not." (Italics ours.)

In *McQuitty vs. Wilhite,* 218 Mo. 592, we find:

"So also it is said in 11 Am. and Eng. Ency. Law (2 Ed.) 838: 'At common law the real property of a decedent could not be *subjected to his simple contract debts,* but it descended directly to his heirs who became liable for the debts by specialty or matters of record, and in case of a deficiency of personal property the creditors by simple contract lost their debts. This rule of common law was changed by statute * * * and the real estate of a decedent, in case of a deficiency of personal property now descends to the heirs of the deceased owner, *subject to the payment of his debts,* for which purpose it may be sold in an appropriate proceeding." (Italics ours.)

In *Hannibal Trust Co. vs. Elzea,* 286 S. W. 371, the Supreme Court of Missouri in January, 1926, considered a will in connection with the provisions of Section 512 of the Revised Statutes of Missouri, which is as follows:

"A charge or encumbrance upon any real or personal estate for the purpose of furthering the payment of money or the performance of any covenant or agreement shall not be deemed a revocation of any will relating to the same estate previously executed but the devises and legacies therein contained shall pass and take effect subject to such charge or encumbrance."

On this the Court said:

"Again in the interpretation of statutes words in common use are to be construed in their natural, plain and ordinary significance, 36 Cyc. 1114. The words 'subject to' are defined by lexicographers as meaning 'liable for' and the word 'liable' is defined as 'bound or obliged in law or equity, responsible, answerable.' Webster's New International Diction-

> ary; Century Dictionary. Paraphrasing the last clause of the statute according to the natural and ordinary significance or meaning ascribed to the words used therein, it would read 'but the devises and legacies therein contained shall pass and take effect, answerable for and bound in law or equity with such charge or encumbrance.'"

See also *Fredelt vs. Fair Grounds R. E. Co.*, 69 S. W. 637, where the Court said:

> "In respect to the interest notes it is to be observed that the assignments were made subject to the deed of trust. The words 'subject to' when used in a connection like this mean 'charged with.' The assignment of the rents 'subject to the deed of trust' in effect charge the payment of the interest notes against the rents."

In this connection, it is also well to give further attention to the precise language of subdivision (a) of Section 402. It will be noted that in order to be properly included in the gross estate, the real estate in question must be "subject to the payment of the expenses of its administration." There can be no doubt that this language means that the property in question must be subject to the payment of the expenses of administration of the estate of the decedent. The statute does not prescribe that the property need only be "subject to" expenses of administration. It prescribes that the property must be subject to the *payment* of *the* expenses of administration of the estate of the decedent.

The word "the" preceding and modifying the word "expenses" means that the property in question must be subject to the payment of *all* expenses of administration. The word "the" when so used means "all". The word "the" has been on numerous occasions so construed.

Thus, this Court in *New York Trust Company vs. Eisner*, 256 U. S. 345, in construing the clause "Charges

against the estate" in the Revenue Act of 1916 held that such charges were only those which affected the estate *as a whole,* and therefore did not include taxes on the right of individual beneficiaries.

In *Adams vs. Pease,* 113 Ill. App. 356, 1. c. 360, the Court said:

> "Still another objection is that some of the instructions leave it to the jury to find the facts 'from *the* evidence' and not 'from the preponderance of the evidence'; and it is said that thereby the jury might find a fact from *some* of the evidence, and not from the *whole.* If this criticism is well founded, it applies with equal force to both phrases. A preponderance of the evidence would then also mean a preponderance of *some* of the evidence. In point of fact, the words 'the evidence' mean *all* the evidence."

In *Bailey vs. Homestead Fire Insurance Company,* 16 Hun. (N. Y.) 1. c. 506, the Court had before it a suit on an insurance policy and was called upon to construe a provision reading as follows: "This Company shall not be liable for any loss * * * if without written consent hereon, *the* property shall become incumbered in any way." The policy covered both real and personal property. Thereafter, a judgment lien accrued on the real property only. A fire destroyed a building which was covered by the policy and which was affected by the judgment lien. The Court held that the words *"the* property" referred to the *whole* property insured; that is, *all* the property covered by the policy.

In *Born vs. Home Insurance Company,* 110 Iowa 379, the Court was construing a policy of insurance against loss by fire, lightning, etc., covering both real and personal property, which policy provided that "if *the* property shall hereafter become mortgaged or incumbered" the policy should become null and void. The Court said:

"It is *the* property, not a part of it; not the real nor the personal, but the *whole,* property, the mortgaging of which renders the policy void. 'The property' is without qualification, and we think must be held to refer to *all* the property insured, and therefore mortgaging or incumbering a part of it did not work a forfeiture of the entire policy." (Italics ours.)

In *Bryan vs. Peabody Insurance Company,* 8 W. Va. 606, the Court was construing an insurance policy which provided that "if the above mentioned premises shall become occupied or used so as to increase the risk, or become vacant or unoccupied, and so remain for more than thirty days without notice to, and consent of, this Company * * * this policy shall be void." The Court said that this provision "must be construed to mean and apply to the *whole* or *entire* premises, as to its becoming vacant or unoccupied, and not merely to a part thereof. Had the Company intended otherwise, it is reasonable to suppose it would have so declared."

Hence, subdivision (a) of Section 402, providing that property, before it can be properly included in the gross estate of the decedent, must be "subject to" the *payment* of *the* expenses of administration of the estate, must be construed as requiring that property in question must be subject to the payment of all expenses of administration of the estate; that is, subject to the payment of expenses of administration *generally* or *as a whole.* The word *"the,"* read in the light of the context of subdivision (a), can have no other meaning.

Therefore the contention of the petitioner that the provision "subject to * * * the expenses of its administration" should be construed to mean that if under the law of a state the real property of a decedent could, as a practical matter be applied either directly or indirectly

to the payment of the expenses of administration, under any circumstances, is manifestly incorrect.

(b) The Word "and" in the Provision Does Not Mean "or" as Contended by the Appellant.

Under Point II the petitioner contends that in the phrase "subject to the payment of the charges against his estate and the expenses of its administration" the word "and" should be given the meaning of the word "or". Defendant adds that there is not in the English language a single word to express the idea "and/or", and adds, "the expression 'and/or' has not been used in the federal taxing statutes"; and then contends the word "and" in the phrase now in question was used in a sense which would have been more accurately expressed by the expression "and/or", or more simply by the word "or". There could be no occasion for the use of the expression "and/or" in a taxing statute which must be categorical. The expression "and/or" connotes an alternative, and the use of an alternative can only cast doubt and ambiguity on a taxing statute.

Several cases are cited by the petitioner in support of the proposition that it is the duty of the Court to ascertain the clear intention of the legislature and that in order to do so Courts are often compelled to construe "and" as meaning "or". In this particular case there is nothing to show that the legislature meant "or" and the only reason for construing the said word "and" to mean "or" would be to enable the Government to impose a tax upon property which otherwise might not be taxable. There is no ambiguity in the provision, and even if there were, under the decisions of this Court, the ambiguity should be construed in favor of the taxpayer. Moreover, this Court has construed the said paragraph in the case of *United States vs. Field, supra,* to the effect that the

word "and" in said paragraph means "and" and not "or".

IV.

(a) The Common Law Rule That Real Estate Is Not Subject to the Payment of the Expenses of the Administration of Decedent's Estates Has Not Been Modified by the Statutes of Missouri and Is in Full Force in Said State.

Under Point III of the petitioner's brief it is admitted that at common law real estate could not be sold for the payment of the administration expenses and that the common law is in effect in Missouri except as modified by statute. It is apparently contended that the common law has been so modified by statute as to subject the real estate to the payment of the expenses of administration at least under some circumstances. We deny the contention and we submit that the common law upon this subject is in full force and effect and has not been modified in any particular.

The Common Law of England, except as changed by statute, is in full force and effect in Missouri.

Lindell vs. McNair, 4 Mo. 380;
Beaume vs. Chambers, 22 Mo. 36;
Baker vs. Crandall, 78 Mo. 584;
R. S. Mo. 1879, Section 3117a;
R. S. Mo. 1899, Section 6551;
R. S. Mo. 1909, Section 8047;
R. S. Mo. 1919, Section 7084.

No authority need be cited for the proposition that, at common law, an administrator could have nothing to do with real estate. It was not even subject to the payment of debts of the deceased.

> "In some jurisdictions the statutes give to the executor or administrator a certain control over the land of decedent, usually either for the purpose of

preserving the same from waste during the course of administration, effecting a division and distribution among those entitled, or subjecting it to the payment of the decedent's debts in case the personal assets prove insufficient for this purpose. But such grants, being in derogation of the common law, must be strictly construed and the rights of the representative confined to those which are clearly given to him." (24 C. J., 133.)

In Missouri, the rule of common law was modified by the legislature in 1822 so that real estate became liable for debts of the decedent. In 1865 the law was further modified by the legislature so that the real estate became subject to the payment of legacies. In 1921, the law was further modified by the legislature of Missouri to subject the land of the decedent to the payment of the allowance to the widow in lieu of provisions. But otherwise the common law still applies to Missouri real property of a decedent and it cannot be held liable for, cannot be subjected to, and cannot be sold to pay, the expenses of administration of a decedent's estate. Under the decisions of the Missouri Courts, real estate of a decedent is not subject to the payment of the expenses of administration of his estate.

Farrar vs. Dean, 24 Mo. 16;
Presbyterian Church vs. McElhinney, 61 Mo. 540;
Teverbaugh vs. Hawkins, 82 Mo. 180;
Garnett vs. Carson, 11 Mo. App. 290;
In re *Motier's Estate,* 7 Mo. App. 514;
Ritchey vs. Withers, 72 Mo. 556;
State vs. Doud, 269 S. W. 923;
In re *Estate of Lloyd,* 44 Mo. App. 670;
Dilding vs. DeHart, 293 Mo. 393.
Howell vs. Jump, 140 Mo. 441;
Elstroth vs. Young, 94 Mo. App. 351.

The decisions of the Missouri Courts are in line with the decisions of the Courts of sister states rendered when,

under the then existing statutes of such sister states, real property could not be subjected to the payment of expenses of administration. These decisions of the sister states speak in no uncertain tones and are in line with the decisions already cited by the Appellate Courts of Missouri.

In *Drinkwater vs. Drinkwater,* 4 Mass. 354, the Court held—

> "And lands not being liable for the payment of debts at common law, they are made liable by statute, which does not extend the liability to the defraying of charges of administration. The personal estate alone is a fund for the payment of those charges."

To the same effect are:

Cary vs. Dennis, 13 Md. 1;
In re *Hatch,* 182 N. Y. 320;
Fitzgerald vs. Glancy, 49 Ill. 465;
Walker vs. Diehl, 79 Ill. 473;
Hollman vs. Bennett, 44 Miss. 322;
Moore vs. Ware, 51 Miss. 206;
Woerner, American Law of Administration, 3rd Ed., p. 1627.

(b) The Commission Allowed Upon the Sale of Real Estate to Pay Debts of a Decedent Is Not an Expense of Administration.

The petitioner contends that, where personal property is insufficient to pay debts, the administrator or executor, under the statutes of Missouri, can thereupon sell real estate sufficient to pay such debts, and that in such case all expenses of the sale are payable out of the proceeds of the sale, and that the Missouri statutes further entitle the executor or administrator "as full compensation for services and trouble a commission of five per cent." The petitioner argues this five per cent is an expense of administration.

Neither in fact nor in law is the payment of the five per cent an expense of the administration of the decedent's estate. There is no doubt that under the Missouri decisions real estate of a Missouri decedent descends to his heirs and does not come into the possession of the administrator as such for any purpose. It is true that Missouri statutes do permit the land of a decedent to be sold to satisfy legacies, debts or an allowance in lieu of provisions to the widow, where the personal property is insufficient for such purpose. Clearly, however, the administrator does not sell the real estate in such event as part of his duties as administrator because he has no right to administer upon the real estate. The real estate is not in any sense a part of the estate he is administering. He does not sell the real estate by virtue of his office as executor or administrator. It is true that he receives a commission of five per cent for his work and trouble in conducting the sale but that five per cent is payable to him just as the expenses of conducting the sale are payable to others, as part and parcel of the sale of real estate to satisfy particular purposes indicated by the statute and for no other purposes whatsoever. In selling real estate to pay debts, the administrator sells the same *not by virtue of his office,* but as a person specially designated by statute to convert into cash a sufficient amount of real property, not a part of the estate but outside of the estate being administered, so that such amount of cash may be inducted into the estate to meet the particuar purposes or one of them pointed out by the Missouri statute.

It was held in the case of In re *Rickenbaugh,* 42 Mo. App. 1. c. 338 that—

> "The right of an executor to sell land does not exist virtute officii; for, by virtue of his office, he has to deal only with personalty."

See also *United States vs. Field , supra,* 263, where this Court in dealing with the power of appointment, holds—

> "The appointed property is treated as equitable, not legal, assets of his estate; * * * and (in the absence of statute), if it passes to the executor at all, it does so not by virtue of his office but as a matter of convenience and because he represents the rights of creditors."

It seems to involve a contradiction in terms to say that an executor under the Missouri Statutes will be permitted by the Courts to use the proceeds of the sale of real estate to pay expenses of administration and, on the other hand, to admit that no Probate Court of Missouri can make an order to subject the real estate of a decedent to such purpose. It cannot be that the Missouri Statutes authorize the payment of expenses of administration out of the proceeds of the sale of real estate, in the face of the conceded fact that the statutes do not authorize the use of the proceeds of the sale of real estate for such purpose.

> In re *Hatch,* 182 N. Y. 320;
> *Cook vs. Woodward,* 5 Dem. Sur. 97.

In petitioner's brief, page 52, we find—

> "The question as to whether, when a sale has been made to meet the payment of debts, the proceeds of the sale may be used to meet the payment of administration expenses is one upon which the Missouri decisions *are not entirely clear.*" (Italics ours.)

If the Missouri decisions upon which appellant relies "are not entirely clear," then appellant's entire position is wrong. The right to impose a tax must be clear and free from doubt. The petitioner refers to Section 149 of the Revised Statutes of Missouri. That Section must

be read in conjunction with the preceding and succeeding Sections of the Missouri Statutes which deal with the proceeds of sale of real estate, not as administration sales under orders of the Probate Court, but to satisfy judgments and attachments. That statute provides that the proceeds of such sales, after satisfying the judgments and attachments and other liens, become assets in the hands of the administrator, "to be administered according to law." The clause quoted means according to the administration law of the State of Missouri as interpreted by the Missouri Courts. It has been ruled by Missouri decisions (see *State vs. Doud, infra,* and other cases cited) that the surplus moneys growing out of the sales of real estate under order of the Probate Court after the satisfaction of debts and expenses of the sale are the same as real estate and belong to the heirs and devisees, and cannot be used for any other purpose. To the same effect are the decisions where sales of real estate of the decedent produce a surplus after satisfying judgments, attachments or mortgage liens. The surplus funds on hand after satisfying such judgments, attachments and mortgage liens and after payment of expenses of sale, are likewise held to constitute real estate and belong to the heirs and devisees, and cannot be used for any other purpose.

This same question was considered by Chief Justice Parsons in *Drinkwater vs. Drinkwater,* 4 Mass. 354, construing a Massachusetts Statute similar in import to the provisions of the Missouri Law now under consideration wherein the Court after holding that the proceeds of real estate sold for the purpose of paying debts could not be used to pay administration expenses stated in considering and distinguishing the costs of the sale of the real estate and the cost of accounting for the proceeds:

> "Also when lands, of which the intestate died seized, are sold on license for the payment of debts, the Court authorizes the sale of lands enough to defray the charges of the sale, and of accounting for the proceeds. Because the statute giving an administrator a power to sell lands on license, the Court granting the license must, by a reasonable construction, have authority to indemnify him in executing the power. So also a judgment creditor may levy his execution for his costs as well as his damages, on the land."

It will be thus seen that the Massachusetts Court clearly distinguished between administration expenses and the costs of the sale and the costs of accounting for the proceeds.

(c) The Petitioner in Its Brief Has Misconstrued Certain Decisions of the Missouri Courts.

In Appendix C of the petitioner's brief is an analysis of the laws of Missouri and the decisions of the Courts of Missouri which it is urged prove that under some circumstances as a practical matter the real estate may be sold to pay the expenses of the administration. But the appellant arrives at his conclusions in said discussion only by misconstruing the plain purport of some of the decisions of the Court of Missouri and by minimizing the force of other decisions of said Courts.

The language of one of the conditions of paragraph 402 (a) is that the interest of the decedent must be "subject to the payment of the expenses of its (the estate's) administration." The Courts of Missouri have uniformly held that in that state under no conditions can real estate be sold to pay *the* expenses of the administration of an estate.

Farrar vs. Dean, 24 Mo. 16;
Presbyterian Church vs. McElhinney, 61 Mo. 540;

Teverbaugh vs. Hawkins, 82 Mo. 180;
Garnett vs. Carson, 11 Mo. App. 290;
Howell vs. Jump, 140 Mo. 441.

The fact that under the laws of Missouri the real estate of a deceased person cannot be sold to pay the administration expenses would seem to be conclusive that such real estate is not subject to the payment of the expenses of the administration of an estate within the meaning of Section 402 (a) of the Revenue Act of 1918. Certainly, property that cannot be sold to pay such expenses is not subject to the payment of said expenses. But the Courts of Missouri have gone further than that and have held that the proceeds derived from the sale of real estate made for the purpose of paying debts and legacies cannot be used to pay administration expenses. Thus, in the comparatively late case of *State vs. Doud,* 269 S. W. 924, the Court of Appeals again adhered to this well established principle, saying that:

> "If the real estate is sold by order of the Probate Court for the payment of the debts of the decedent, *any surplus of the proceeds of the sale remaining after payment of the debts goes to the heir or devisee.* * * * In other words, when real estate is converted into money for the payment of the debts of the decedent, *the surplus of the proceeds of the sale remaining, after payment of the debts, retains the character of real estate for the purpose of succession or distribution,* and goes to the person in whom the title to the real estate was vested when it was converted." (Italics ours.)

The Court of Appeals of Missouri in the case of In re *Motier's Estate,* 7 Mo. App. 514, at page 517, said:

> "The land belongs to the heirs. It cannot be touched for any of the purposes of the administration, except in the specific mode and for the specific objects elsewhere indicated by statute. When real

> estate is converted into money, whatever surplus remains after a proper application of the objects of the conversion still represents the realty for the benefit of the heirs and cannot be merged in the personalty for purposes which pertain only to that classification."

In the case of *Ritchey vs. Withers,* 72 Mo. 556, the Supreme Court of Missouri, at page 559, announced the principle that:

> "The County Court had no power to order the sale of real estate except for the payment of debts, and when it was sold for that purpose, the proceeds arising from the sale could not be diverted from it and applied to another and different purpose."

In *Elstroth vs. Young,* 94 Mo. App. 351, referred to on page 54 of appellant's brief, the Court of Appeals of Missouri recognized the decision in *Ritchey vs. Withers* as controlling, saying:

> "The proceeds of the sale of the lands made by an order of the Probate Court in pursuance of the provision of Chapter I, Article 8, Revised Statutes, 1899, cannot be used for the purpose of making good deficiencies in the expenses of administration. *Ritchey vs. Withers, 72* Mo. 556."

The case of *Elstroth vs. Dickmeyer,* 88th Mo. Appeal 418 which was later before the Court as *Elstroth vs. Young,* 94 Mo. Appeal 351, do not sustain the contentions made on page 54 of the petitioner's brief. Attention is invited to the discussion by the court below of the effect of those decisions. (R. pages 14-15.) However, whatever may have been the effect of the decision in the case of *Elstroth vs. Dickmeyer,* the ultimate decision in the case of *Elstroth vs. Young* certainly sustains the contention which we make. The language of the latter decision is—

> "The proceeds of the sale of the lands * * * cannot be used for the purpose of making good deficiencies in the expenses of administration."

It will thus be seen that the Courts of Missouri in their interpretation of the administration law of the state have decided without a dissenting voice that real estate cannot be sold to pay the expenses of administration, and that if it is sold upon an insufficiency of personalty for the purpose of paying debts or legacies, the proceeds cannot be used to pay the administration expenses. Certainly then, it cannot be said that real estate in Missouri is "subject to the payment of the expenses of administration."

The case of *Howell vs. Jump,* 140 Mo. 442, referred to on page 54 of the appellant's brief and relied on by the Court of Claims in the *Steedman* case, was not a controversy involving the question whether or not the real estate of a decedent might be used to pay the expenses of administration of the estate, but to determine whether or not a purchaser at an administrator's sale could be divested of his title because the administrator misapplied the proceeds of the sale to the payment of the expenses of administration contrary to the statute. Even the most casual reading of the *Jump* case shows that the case is exactly in line with our contention and opposed to the appellant's contention. That case dealt with a question of title to real estate growing out of an order made by the Probate Court to sell the particular property, which order was limited to a petition of the administrator to sell the land to pay debts. The administrator used the proceeds of the sale of that land not only to pay debts but to pay administration expenses. Upon learning these facts, the heirs filed suit to set aside the sale because the administrator used the proceeds of the sale for an unlawful purpose. The decision holds that since the order

of sale complied with the statute, the purchaser at the administrator's sale obtained a good title which was not affected by the fact that the administrator subsequently misused or misapplied the funds growing out of the sale. It will be observed that the decision is bottomed on the proposition of law for which we are contending, and the decision does not in any way hold that the land could properly be subjected to the payment of expenses of administration.

In both Courts below this petitioner relied upon the *Jump* case to support its contentions but after careful consideration of that case the District Court said (R. page 9), "Clearly this case not only does not conflict with but supports plaintiff's theory," and the Circuit Court of Appeals held likewise. (R. page 15.)

CONCLUSION

Respondent submits that:

(1) No property may be included in the gross estate of decedents for taxation purposes under Section 402 (a) of the Revenue Act of 1918, unless such property is inter alia subject to the payment of the expenses of administration of decedent's estate.

(2) Real estate in the State of Missouri is not subject to the payment of the expenses of administration of decedents' estates and, therefore, is not within the purview of said provision.

(3) The property of the decedent which is sought to be included in the gross estate for taxation purposes in the instant case is real estate in Missouri and it is not claimed by the petitioner that it is taxable under any law except said paragraph (a) of said Section 402.

(4) The Circuit Court of Appeals held that said prop-

erty is not taxable under said provision and said decision should be affirmed.

Respectfully submitted,

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